

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

10A
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74-2410

BRLS

United States Court of Appeals

For the Second Circuit.

BERNARD KAMHI,

Plaintiff-Appellant

-against-

MANNIE COHEN

Receiver,

Defendant-Appellee.

Appellant's Appendix

FRANK DELANEY

Attorney for Plaintiff-Appellant

750 Park Avenue

New York, N.Y. 10021

(212) TR 9-4600

ARTHUR J. HAUSSMAN

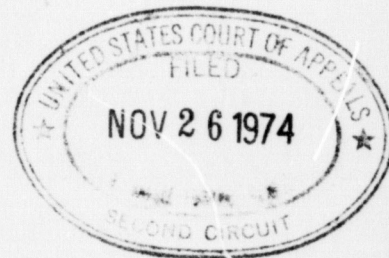
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TABLE OF CONTENTS

	Page
Docket Entries	A
Complaint	1A
Certificate of Order of Protection	12A
Summons	14A
Motion to Dismiss	16A
Notice of Motion	17A
Affidavit of Mannie Cohen	18A
Findings of Fact and Conclusions of Law, Judgment of Divorce	22A
Ex Parte Order	31A
Affirmation of Joshua S. Sparrow	33A
Plaintiff's Affidavit In Opposition To A Motion To Dismiss	35A
Memorandum of Plaintiff in Opposition To Defendant's Motion to Dismiss	41A
Defendant's Reply Memorandum In Support Of Motion To Dismiss	54A
Reply Affidavit of Arthur J. Haussman	63A
Answering Affidavit of Frank Delaney	67A
Plaintiff's Memorandum In Reply To Defendant's Memorandum In Support Of Motion To Dismiss	79A
Counter-Order	92A
Notice of Appeal	94A
Undertaking for Costs on Appeal	95A
Clerk's Certificate	97A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BERNARD KAMHI,

Plaintiff,

74C 937

-against-

MANNIE COHEN, Receiver

Defendant.

INDEX ON APPEAL

Photocopy of Docket Entries	A-B
Complaint	1
Order for Personal Service of Summons, Summons and Return of Marshal	2
Notice of Motion to Dismiss by Defendant, etc.	3
Plaintiff's Affidavit in Opposition to Motion to Dismiss	4
Memorandum of Plaintiff in Opposition to Motion to Dismiss	5
Defendant's Reply Memorandum in Support of Motion to Dismiss	6
Defendant's Reply in Opposition	7
Plaintiff's Answering Affidavit	8
Memorandum of Plaintiff in Opposition to Defendant's Motion to Dismiss	9
Plaintiff's Memorandum in Opposition to Counter-Order	10
Counter-Order	11
Notice of Appeal Filed	12
Undertaking for Costs on Appeal	13
Clerk's Certificate	14

A and B

74C 937

KAMMI - vs. - COHEN

[illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

74C 937

BERNARD KAMILL,

:-

Plaintiff, :

COMPLAINT

-against-

JURY TRIAL
DEMANDED

MAHIE COHEN

Receiver,

Defendant.

-----X

Plaintiff for his complaint alleges and shows
to the Court:

I. Plaintiff was and now is a resident of and
domiciled in the City of Reno, County of Washoe, State
of Nevada, and has been resident there and domiciled there
since October 17, 1973.

II. Defendant is a sequester appointed by the
New York Supreme Court of the State of New York, Kings
County, with a business address at 16 Court Street,
Brooklyn, Kings County, New York and residing in Brooklyn,
Kings County at 1424 Coney Island Avenue and is a citizen
of the State of New York.

III. The jurisdiction herein is founded on diversity
of citizenship and a question under the Constitution of
the United States, of jurisdiction, and the amount in

controversy. The action arises under the Constitution of the United States, and the laws and statutes of the State of New York and of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

IV. The highest court of the State of New York, the Court of Appeals, holds that in the absence of in personam jurisdiction, founded on the domicile and residence of the defendant in the State of New York, any seizure by a sequester subsequent to judgment is invalid, and there was no in personam judgment or jurisdiction, and the judgment of divorce in Nevada in favor of plaintiff, a permanent resident and permanently domiciled there, is entitled to Full Faith and Credit under the Constitution of the United States.

V. Plaintiff is not, and was not, a resident of the State of New York on October 13, 1973 or at any time thereafter, neither on December 3, 1973, nor on April 25, 1974, or any times between those dates, nor since that time has had no abode or place of residence in New York on October 13, 1974 nor at any time thereafter, and has not returned to New York State nor has at no time since October 17, 1973 had any intention to establish residence or domicile in the State of New York, but only to retain

his residence and domicile in the State of Nevada permanently.

VI. Judgment was entered in the State of New York on April 30, 1974 in the case of Kamhi v. Kahmi in the New York Supreme Court, Kings County, Index No. 19974-1973, purporting to be an in personam judgment, in an action attempted to be commenced by plaintiff's wife against plaintiff here for divorce in the State of New York, was made on April 25, 1974 and entered on April 30, 1974 based upon service of summons and complaint in the State of Nevada on plaintiff herein, not then a resident of or domiciled in the State of New York nor had any abode and place of residence therein then or since, and said service in the State of Nevada was invalid to confer in personam jurisdiction on the Courts of the State of New York, or support an in personam judgment of the Courts of the State of New York founded on such service on such a non-resident of New York State, and the judgment in rem was also invalid because a valid decree of divorce had been entered in favor of plaintiff, a resident domiciled in the State of Nevada, against his wife, the defendant therein, on December 21, 1973, which is entitled to Full Faith and Credit under the Constitution and Laws of the United States.

VII. Plaintiff was sometime prior to October 17, 1973 a practicing physician in the State of New York,

specializing in Urological Surgery, and was in partnership therein with Marcel Porowitz, M.D., with a principal office at 61 Eastern Parkway, Brooklyn, Kings County, New York, and a branch office at Hewlett, Long Island, New York.

VIII. In April, 1973, Dr. Porowitz elected to dissolve the said partnership, and difficult and hasty negotiations ensued at the insistence of Dr. Porowitz, for the winding up of the partnership, and on or about May 3, 1973 the partnership was wound up pursuant to which winding up plaintiff was compelled by the circumstances of the former practice to undertake solely heavy financial obligations, theretofore the joint obligation of both partners.

IX. Prior to the dissolution, negotiations and the winding up, the said partnership had earned gross professional fees of approximately between two hundred fifty thousand dollars (\$250,000) and two hundred seventy-five thousand dollars (\$275,000) annually from the two offices, and Dr. Porowitz shared equally with plaintiff.

X. At the same time, another employee, of less experience, also a specialist of urology, Leslie Josephy, M.D., resigned his position as an assistant to plaintiff together with the principal nurse of plaintiff, and said Dr. Josephy set up a practice elsewhere with the assistance of plaintiff's said former employee, both having been employees of the

partnership prior to its winding up as aforesaid.

XI. Plaintiff was unable in the emergency to find any other qualified professional assistant, and the Hewlett office had to be closed with large losses, because plaintiff, Dr. Kamhi, could not conduct both offices, and could not alone perform the services required by the former partnership, as the volume of work was too great for plaintiff to carry it on without an unavailable assistant, and the practice and the gross professional fees dwindled and the financial obligations and overhead increased prohibitively.

XII. In this crisis the plaintiff's wife, Shirley Kamhi, sought to revive an abandoned divorce case, which both parties had abandoned, after which they had resumed permanent cohabitation with their children as a family, and plaintiff discontinued same, but the Supreme Court, Kings County, attempted to ignore the discontinuance duly filed, but upon appeal, the Appellate Division of the New York Supreme Court for the Second Judicial Department reversed the Court below, and dismissed the action as duly discontinued. A copy of the order of the Appellate Division is annexed and made a part hereof.

XIII. Due to these events, plaintiff became ill and was physically unable to discharge his professional burdens for that added reason as well as the volume of the

practice, and plaintiff was no longer able to attempt to carry on the practice.

XIV. In addition, prior thereto, the plaintiff's son graduated with an A.B. degree from Skidmore College, Saratoga, New York, and his graduation exercises took place on Sunday, May 20, 1973, and plaintiff attended, as did his wife, but separately.

XV. After the return of the parties to New York plaintiff was charged in the Family Court of the State of New York, City of New York, County of Kings, Docket No. 6696/73, by his said wife, with having attempted to strangle his wife in a public corridor of the Gideon Putnam Hotel without any witnesses present when she went out of her room without notice to anyone to mail a letter and without a report having been made to the Saratoga Police, or to the New York State Park Police, who have jurisdiction of the Gideon Putnam Hotel and the New York State Health Facilities, or to the management of the Hotel.

XVI. Plaintiff denied under oath the accusation and still denies it, and denies that he was ever in the Gideon Putnam Hotel or its grounds, or that any incident to which he was a party ever occurred there or in the vicinity, nor did he see his wife at said Hotel.

XVII. Nevertheless the case was brought to trial before Honorable Gilbert Ramirez in the Family Court of

the State of New York, County of Kings, who is unfortunately blind, and could not himself examine Exhibits as to which he made findings and rulings as interpreted by an assistant.

XVIII. In oral opinion, Judge Ramirez found plaintiff had done this act but in the judgment merely ordered, as follows: that "Both parties shall not strike, harass, or recklessly endanger or annoy each other, and Bernard Kamhi to stay away from Shirley Kamhi at all times, copy of which order is annexed.

XIX. Plaintiff appealed, but although his counsel has requested them, he has never been able to obtain a copy of the minutes which is essential to perfect the appeal.

XX. Plaintiff in these circumstances became unable to carry on alone his medical practice in New York and was forced to start anew in some other locality, and thereupon gave up his New York residence totally, and moved to Reno, Nevada, and became a resident and citizen of the State of Nevada and domiciled there and so remains.

XXI. Plaintiff at once sought to obtain a license to practice medicine in the State of Nevada, and prepared the application therefor, and exhibits required therefor, and duly filed said application with the proper authorities in the State of Nevada.

XXII. Said application discloses the residence of the plaintiff in the State of Nevada and his domicile therein.

XXIII. Said license to practice in the State of Nevada

was duly granted to plaintiff on or about January 18, 1974, and is No. 2764, and plaintiff has since sought to make arrangements necessary to develop a practice in Nevada where he continues to make his residence and domicile at No. 548 Bell Street, Reno, Nevada.

XXIV. Plaintiff has not returned to the State of New York nor does he intend to do so, and had completely ceased practicing professionally in New York since prior to October 18, 1973, and has not practiced there since that date, and is seeking to earn his living elsewhere.

XXV. On or about December 3, 1973, said Shirley Kamhi sought an order in the New York Supreme Court, Kings County, to permit her to serve the summons and complaint and an order to show cause therein on plaintiff, outside the State of New York, in which supporting affidavit therein of the said plaintiff wife stated that plaintiff could not be found in the State of New York at any time or place, and since October 13, 1973, at the time of said application on December 3, 1973, plaintiff had become a permanent resident of, and permanently domiciled in, the State of Nevada.

XXVI. That sometime subsequent to December 3, 1973 the aforesaid summons and complaint was attempted to be served on plaintiff outside the State of New York while plaintiff was not a resident of the State of New York and was a resident of the State of Nevada and there domiciled,

and intending to remain there permanently and after plaintiff had been compelled to abandon his practice as a urological surgeon in New York because he became physically incapable of performing his professional obligations as in the past, because of the foregoing conditions and circumstances and had to seek employment elsewhere.

XXVII. That plaintiff was not domiciled, nor residing in, nor living in, nor staying in the State of New York on October 18, 1973, when his wife, Shirley Kamhi, alleges she commenced an action against him in New York State to set aside a Fraudulent Conveyance, to Recover Title to Real Property, and an Action for an Absolute Divorce, nor did he ever live or reside at the address his wife alleged as his abode, 61 Eastern Parkway, Brooklyn, New York, but the same was solely his professional offices, formerly of the partnership with Dr. Horowitz, nor did he live at 1390 Broadway, Hewlett, Long Island, New York, which was a branch professional office while the partnership with Dr. Horowitz was existing.

WHEREFORE, plaintiff demands judgment as follows:

1. Declaring that the granting of judgment in the Supreme Court, Kings County, Special Term Part V on April 25, 1974 and entered on April 30, 1974, insofar as it finds jurisdiction in personam over plaintiff, based on

residence and domicile of plaintiff in the State of New York at any time subsequent to October 17, 1973 and the service of summons and complaint on plaintiff therein outside the State of New York is invalid and void for lack of such jurisdiction in personam.

2. Declaring plaintiff was and since is a resident and domiciled in the State of Nevada on October 18, 1973, and ever since that date, and a nonresident and non-domiciliary of the State of New York.

3. That the law of the State of New York as decided by its highest Court the New York Court of Appeals, which is situated in the territory of the District Court of the United States for the Southern District of New York, holds that service of summons and complaint for a divorce upon a nonresident outside of the State of New York will not support an in personam judgment.

4. That in the absence of a valid in personam judgment, no property of defendant can be seized under sequestration subsequent to the entry of judgment on April 30, 1974 in an action for divorce brought by a wife founded on service on the nonresident husband outside of the State of New York, Index No. 19974-73.

5. That the attempted seizure by the defendant appointed subject to filing a bond of \$25,000, of property or plaintiff in the National Community Bank of Staten Island

subsequent to April 30, 1974 is invalid and null and void.

6. That defendant be enjoined from sequestering or interfering with the said property of plaintiff or any other property of plaintiff not seized by defendant prior to April 30, 1974.

7. That the sequester was not named until May 13, 1974 and did not qualify until that date and he was not able to seize any property of plaintiff prior to judgment entered April 30, 1974.

8. That the defendant be directed to restore to plaintiff any property already seized by him subsequent to April 30, 1974.

Plaintiff requests a trial by jury.

Dated: New York, New York

June 21, 1974.

(Sgd.) Frank Delaney
FRANK DELANEY
Attorney for Plaintiff
750 Park Avenue
New York, New York 10021
(212) TR 9-4600

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF Kings

Docket No. 0-6696/73

In the Matter of
Shirley Kamhi, Petitioner
VS
Bernard Kamhi, Respondent

CERTIFICATE OF ORDER OF PROTECTION

THIS IS TO CERTIFY, that an Order of Protection has been issued by this Court to the Petitioner in the above-entitled matter, wherein it is

ORDERED, that Respondent shall observe the following conditions of behavior:

Both parties shall not strike, harass, or recklessly endanger, or annoy each other, and Bernard Kamhi to stay away from Shirley Kamhi at all times.

AND IT IS PROVIDED BY LAW that the presentation of this Certificate to any Peace Officer shall constitute authority for said Peace Officer to take into custody the person charged with violating the terms of such Order of Protection and bring said person before this Court and otherwise, so far as lies within his power, to aid the Petitioner in securing the protection such Order was intended to afford.

THIS CERTIFICATE shall be and remain in effect for a period of 12 months from the date hereof.

DATED: Oct. 9, 1973

(Sgd.) Joseph X. Kenan
Clerk of the Court

42 APPELLATE DIVISION REPORTS, 2d SERIES

BERNARD KAMHI, Appellant, v. SHIRLEY KAMHI, Respondent.--
In an action for divorce, plaintiff appeals from an order of the Supreme Court, Kings County, dated March 29, 1973, which, inter alia, (1) granted defendant's motion for alimony and child support pendente lite and other relief and (2) directed plaintiff to serve a complaint. Order reversed, without costs, and defendant's motion denied. It appears that plaintiff commenced this action on March 21, 1972 by the service of a summons only. Defendant served a notice of appearance and demand on April 3, 1972 and continued living together until about January 2, 1973. By notice of motion dated March 1, 1973, returnable March 15, 1973 and adjourned to March 22, 1973, defendant moved for various relief pendente lite. On March 22, 1973 plaintiff duly filed and served a voluntary notice of discontinuance of the action pursuant to CPLR 3217 (subd. [a], par. 1). As indicated, the order appealed from was made on March 29, 1973. In the light of the sequential events in the action and considering the procedure followed by defendant in her own prior matrimonial action, we are not disposed to hold that plaintiff's filing of the voluntary notice of discontinuance was designed primarily to circumvent the previously indicated decision of Special Term. Absent "a responsive pleading" (CPLR 3217, -ubd. [a], par. 1), plaintiff had the statutory right to voluntarily discontinue the action, particularly where no motion had been made by defendant to compel service of a complaint pursuant to CPLR 3012 (subd. [b]), and her own motion for temporary relief was not returnable until March 15, 1973. While we understand the reaction of Special Term, in the context of this record we deem the failure to recognize the validity of the voluntary notice of discontinuance to be an improvident exercise of discretion. Defendant is not without a ready remedy. If, as she claims, there exists a basis for commencement of her own action against plaintiff grounded upon his current misconduct, she may initiate an appropriate proceeding in the Supreme Court, if so advised; or she may return to the Family Court where she has had previous recourse and where she presently has a proceeding pending which is about to be heard. In either forum, a plenary hearing could be held as to plaintiff's income and resources, as to his obligation to support the recently emancipated son of the parties and as to the extent of the son's own recently acquired estate. Munder, Acting P.J. Martuscello, Shapiro, Christ and Brennan, JJ., concur.

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 74C937

BERNARD KAMHI,

Plaintiff,

SUMMONS

v.

MANNIE COHEN, Receiver

Defendant.

To the above named Defendant

You are hereby summoned and required to serve upon
FRANK DELANEY

plaintiff's attorney, whose address 750 Park Avenue, Borough
of Manhattan County of New York, New York, N.Y. 10021
an answer to the complaint which is herewith served upon you,
within 20 days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by
default will be taken against you for the relief demanded in
the complaint.

(Sgd.) Lewis Orgel
Clerk of Court

(Sgd.) Maryann Burns
Deputy Clerk

[Seal of Court]

Date: June 25, 1974

15A

PLAINTIFF

BERNARD

74C937

TYPE OF WRIT

Syc

MANNIE COHEN RECEIVER

SERVE

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN

MANNIE COHEN

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)

BUSINESS 16 COURT ST BROOKLYN KINGS COUNTY NY

AT

home 1424 CONEY ISLAND AVE BROOKLYN NY

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Frank Delaney
 150 PARK AVE - A
 NEW YORK NY 10021

Show number of this writ and
 total number of writs submit-
 ted, i.e., 1 of 1, 1 of 3, etc.

NO. TOTAL
 1 of 1

CHECK IF APPLICABLE:

☐ One copy for U. S. Attorney or designee and
 two copies for Attorney General of the U. S.
 included.

SHOW IN THE SPACE BELOW AND TO THE LEFT
 ANY SPECIAL INSTRUCTIONS OR OTHER
 INFORMATION PERTINENT TO SERVING THE
 WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR

Frank Delaney

TELEPHONE NUMBER

TR9-4600

DATE

JUNE 25 1974

SPACE BELOW FOR USE OF U. S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable
 code) and sign USM-285 for first writ
 only if more than one writ submitted.

DEPOSIT/CODE
312DIST. OF
ORIGIN
53DISTRICT
TO SERVE
53

LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of
 writs indicated and for the deposit (if appli-
 cable) shown.

SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK

DATE

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in
 "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual,
 company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc.,
 named above within this Judicial District.

NAME AND TYPE OF INDIVIDUAL SERVED (If not shown above)

JEREMY COHEN SON

ADDRESS (Complete only if different than shown above)

16 Court Street Brooklyn N.Y.

☒ A person of suitable age and
 discretion then abiding in the
 defendant's usual place of abode.

FEE (If applicable)

\$ 3

MILEAGE

\$ 1.12

DATE(S) OF ENDEAVOR (Use Remarks if necessary)

DATE OF SERVICE

6/28/74

TIME

AM
PM

SIGNATURE OF U. S. MARSHAL OR DEPUTY

William J. Burke

REMARKS

also 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
BERNARD KAMHI,

Plaintiff,

-against-

MANNIE COHEN,

Receiver-
Defendant.
-----X

CIVIL ACTION FILE
74 Civ. 937

MOTION TO DISMISS

The defendant moves the Court, as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. To dismiss the action on the grounds that the plaintiff has failed to join an indispensable party.

KADANOFF AND HAUSSMAN, P.C.

By: A/ATH
ARTHUR J. HAUSSMAN
Attorneys for Defendant
Office & P.O. Address
50 Court Street
Brooklyn, New York 11201
(212) 875-6706

NOTICE OF MOTION

TO: FRANK DELANEY, ESQ.
Attorney for Plaintiff
Office & P.O. Address
750 Park Avenue
New York, New York 10021

PLEASE TAKE NOTICE, that the undersigned
will bring the above motion on for hearing, before this
Court, at Room #6, the United States Courthouse, 225 Cadman
Plaza East, Brooklyn, New York, on the 2nd day of August,
1974, at 10:00 o'clock in the forenoon, or as soon
thereafter as counsel can be heard.

Dated: Brooklyn, New York
July 9, 1974

KADANOFF AND HAUSSMAN, P.C.

By: A/ATH
ARTHUR J. HAUSSMAN
Attorneys for Defendant
Office & P.O. Address
50 Court Street
Brooklyn, New York 11201
(875-6706)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X
BERNARD KAMHI,

Plaintiff,

CIVIL ACTION FILE
74 Civ. 937

-against-

AFFIDAVIT

MANNIE COHEN,

Receiver-
Defendant.

-----X

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

MANNIE COHEN, being duly sworn, deposes and says:

1. That he is the defendant in the above entitled action and as such is fully familiar with the facts and circumstances relating to same.

2. That on April 25, 1974, in an action entitled SHIRLEY KAMHI, Plaintiff v. BERNARD KAMHI, Defendant, in the Supreme Court of the State of New York, in and for the County of Kings, under Index #19974/73, a Judgment of Divorce was entered and in that said Judgment your deponent was assigned Receiver and Sequestor. That a copy of that Judgment is annexed hereto and made a part hereof as Exhibit "A". That thereafter, in the same action, pursuant to an ex-party order, dated May 13, 1974, the bond that your deponent had to file was reduced to the sum of \$25,000.00; that a copy of that order is annexed hereto and made a part hereof as Exhibit "B".

3. That your deponent thereby promptly filed the receiver's bond in the sum of \$25,000.00, and further filed his oath with the Supreme Court of the State of New York, County of Kings.

4. That thereafter your deponent promptly sought to discharge his responsibilities pursuant to the order and direction of the Supreme Court of the State of New York, a Court of competent jurisdiction.

5. That the plaintiff seeks by his action to set aside the Judgment of Divorce. He seeks a declaration that he is a resident and domiciliary of the State of Nevada since October 18, 1973; he also seeks a declaration that service of the summons and complaint in the Supreme Court action upon him will not support an in personam judgment.

6. Thereafter he seeks a declaration that the property of the defendant cannot be seized under sequestration; that any seizures are null and void; that your deponent be enjoined from interfering with his property and that your deponent restore the property to plaintiff, already seized.

7. That the essence of plaintiff's cause of action is that the Judgment of Divorce is invalid on account of jurisdictional grounds and therefore your deponent has no right to act as a receiver and sequestor. Your deponent respectfully submits to the Court that he was not and is not a party to the divorce action in the Supreme Court, Kings County, and is acting

only pursuant to the direction of that Court.

8. That if the plaintiff desires to have the Judgment of Divorce set aside he may only accomplish this in a proper action against SHIRLEY KAMHI, the plaintiff in the Supreme Court action that resulted in the Judgment of Divorce. That your deponent has not the capacity to defend this action or to protect the rights of SHIRLEY KAMHI in the judgment; that his only responsibility as receiver and sequestor is with reference to securing property of the plaintiff that may be found within the State of New York. In no way is he charged with the responsibility of validating or defending the judgment underlying the order appointing him receiver and sequestor.

9. That since your deponent is not the one whose judgment plaintiff seeks to overturn in this Court, plaintiff cannot secure the relief in an action against your deponent who is only appointed as receiver and sequestor.

10. That furthermore, plaintiff has failed to join an indispensable party to wit: SHIRLEY KAMHI, for the reason that it is the said SHIRLEY KAMHI'S judgment that plaintiff seeks to set aside and that the same cannot be accomplished without SHIRLEY KAMHI as a party to this action.

WHEREFORE, your deponent respectfully prays that the instant motion be granted and that the within action be dismissed on account of plaintiff's failure to state a claim

upon which relief can be granted and plaintiff's failure to join an indispensable party.

A/MC

MANNIE COHEN

Sworn to before me

this 9th day of July, 1974

Notary

ARTHUR J. HAUSSMAN
Notary Public, State of New York
No. 41-6808995
Qualified in Queens County
Commission Expires March 30, 1976

At a Special Term Part V of the
Supreme Court of the State of
New York, held in and for the
County of Kings, at the Courthouse
111 Livingston St., Brooklyn, N.Y.,
this 25 day of April, 1974.

P R E S E N T :

HON. LOUIS B. HELLER,
Justice.

SHIRLEY KAMHI,

Plaintiff,

-against-

BERNARD KAMHI,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
JUDGMENT OF DIVORCE

Index No. 19974-73

The Plaintiff having brought this action for a
judgment of divorce by reason of the cruel and inhuman treat-
ment of the plaintiff by the defendant, and the summons with
notation, "ACTION FOR ABSOLUTE DIVORCE," endorsed upon its
face, and the verified complaint, together with an order to
show cause made and entered by the Hon. Maurice Bernhardt,
J.S.C., the 3rd day of Dec. 1973, which said order to show
cause contained a stay and injunction against the defendant
from proceeding with an action for divorce in the State of
Nevada; having been all duly personally served upon the
defendant without the State of New York, and the defendant
not having appeared within the time prescribed by statute
therefor, and it appearing from testimony elicited in open

Court, and from the affidavit of non-military service, that the defendant is not in the military service of the United States and the plaintiff having applied to the Court at a Special Term Part V thereof, for a judgment for the relief demanded in the complaint, and the matter having been set down for trial on the 6th day of February, 1974, and the plaintiff having on that day appeared before me and presented written and oral proof of service and in support of the essential allegations of the complaint, and such proof having been heard and considered by me, I decide and find as follows:-

F I N D I N G S O F F A C T

FIRST: That plaintiff and defendant were both over the age of 21 years, at the time of the commencement of this action.

SECOND: That the plaintiff and defendant were residents of the County of Kings, City and State of New York, for more than two years prior to the commencement of this action.

THIRD: That the plaintiff and defendant were married on the 8th day of Sept. 1948, in Forest Hills, N.Y.

FOURTH: That the issue of this marriage are, Lawrence, age 21, and Laurie C. Kamhi, age 15, both of whom live with and are in the custody of the plaintiff wife.

FIFTH: That at the following times, none of which is earlier than five years before the date of the commencement of this action, defendant committed the following acts which

endangered the plaintiff's physical and mental well being and rendered it unsafe and improper for the plaintiff to continue to reside with the defendant.

(a) On May 20, 1973, at Saratoga Springs, N.Y. the defendant assaulted the plaintiff by striking and throttling her and causing her physical harm, and that as a result of such incident and assault plaintiff obtained an order of protection in the Family Court, Kings County, Brooklyn, N.Y. wherein, the defendant was found guilty of the allegations of such assault upon the plaintiff.

(b) On or about the 10th day of March 1971, the defendant struck the plaintiff, and that as a result of such incident the plaintiff likewise obtained a prior order of protection in the Family Court, Kings County, Brooklyn, N.Y.

(c) That these are but two instances of a continuous course of physical assaults upon the plaintiff by the defendant.

SIXTH: That defendant departed the jurisdiction of the State of New York, a place of his actual residence and domicile and went to the State of Nevada for the purpose of obtaining a divorce thereat.

SEVENTH: That during the defendant's sojourn outside of the State of New York, and up to and including the date of inquest herein, the defendant maintained and operated a medical doctor's practice of medicine, in Brooklyn, N.Y. and more particularly at 61 Eastern Parkway, Brooklyn, N.Y. where he maintained offices.

EIGHTH: That the parties are the owners as tenants

by the entirety of premises 77 Gaylord Drive, South, Brooklyn, N.Y., which premises were conveyed from the plaintiff who owned the same exclusively to the parties as such tenants by the entirety on the promise and in the premises of the promised reconciliation of their marriage, which never came to pass, said effort on the part of the defendant being fraudulent and untrue when made.

NINTH: That said promise of reconciliation was made solely for the purpose of obtaining title to the premises 77 Gaylord Drive, South, Brooklyn, N.Y., and that the same was a misrepresentation, falsehood, and untruth when made and was made solely for the purpose of defrauding the plaintiff and taking title interest in said property from her.

TENTH: That while the defendant was in Nevada seeking a divorce he maintained an office and paid salaries to one Denise Wolfson, his secretary and one Alexandra Kostik, his nurse, and that they were so employed until end of January 1974.

ELEVENTH: That defendant earned in excess of \$87,000. during the year, 1971, as evidenced by his 1971 income tax return.

TWELFTH: That plaintiff and her infant issue have not been supported by the defendant since the date of the commencement of this action.

THIRTEENTH: That defendant is the sole owner of a Keough Investment Pension Plan, with Trainer, Wortham & Co., and that this account is held by the Community Bank of Staten Island.

FOURTEENTH: That defendant has bank accounts in this

State and elsewhere in the United States with balances, the total of which exceeds the sum of \$75,000.00.

FIFTEENTH: That plaintiff has not been personally served with any summons for divorce in another action and/or jurisdiction and that she has not been served with a judgment of any other jurisdiction for divorce or any other form of matrimonial action or judgment.

SIXTEENTH: That defendant has caused to be filed with the County Clerk in this action a retainer of a New York lawyer to wit: George Goldberg, Esq., with offices in New York City, which retainer was duly notarized by the said attorney in the County of New York, City and State of New York, but which retainer does not constitute any authorization to appear in this action and the defendant has not appeared herein.

C O N C L U S I O N S O F L A W

FIRST: That jurisdiction has been obtained as required by Section 230 of the Domestic Relations Law.

SECOND: That plaintiff is entitled to a judgment of divorce and the granting of the incidental relief awarded herein.

J U D G M E N T

NOW ON MOTION OF SPARROW and SPARROW, Esqs., JOSHUA S. SPARROW, Esq., of counsel it is

ADJUDGED AND DECREED, that the marriage heretofore existing between SHIRLEY KAMHI, Plaintiff and BERNARD KAMHI, defendant be dissolved and the parties be divorced by reason

of the cruel and inhuman treatment of the plaintiff by the defendant, and it is further

ADJUDGED AND DECREED, that the defendant shall pay to the plaintiff by check or money order, payable to her order, at her usual residence address, to wit: 77 Gaylord Drive, South, Brooklyn, N.Y., or at such other place as she may hereinafter designate in writing, and forwarded on Friday of each week, commencing with Dec. 4th 1973, the sum of \$345.00 per week, together with and in addition thereto, the monthly mortgage amount, including taxes, interest, amortization, and insurance, upon premises 77 Gaylord Drive, South, Brooklyn, N.Y., as and for alimony and child support allocated \$245 to the plaintiff, and, as and for alimony, and \$100.00 per week, and as and for support and maintenance to the infant issue Laurie C. Kamhi, of this marriage, as child support, except medical and dental expenses which might be incurred as extraordinary, and that the plaintiff wife, he and she hereby is granted exclusive possession of the marital residence, and that the defendant is directed further to pay to the plaintiff by check or money order, forwarded on the Fourth day of each month, commencing the Fourth day of December, 1973, the mortgage amortization, interest, insurance and tax expenses charged and designated as and for the mortgage payments upon premises 77 Gaylord Drive, South, Brooklyn, N.Y., and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant shall pay to the plaintiff, the sum of \$4,500 as and for

counsel fees and disbursements in this action, by check or money order payable to the plaintiff at the office of SPARROW and SPARROW, Esqs.; her attorneys, 66 Court St., Brooklyn, N.Y., 11201, and it is further

ORDERED, ADJUDGED AND DECREED, that the property of the defendant within the State of New York, both real and personal and both tangible, intangible be and the same hereby is sequestered, pursuant to Section 233 of the Domestic Relations Law, and it is further

ORDERED, ADJUDGED AND DECREED, that upon filing with the Clerk of this Court, a bond in the penal sum of \$50,000.00 with sufficient sureties, conditioned for the faithful performance and discharge of his duties as receiver and sequester herein, Mannie Cohen, 16 Court St., Brooklyn, be and he hereby is appointed the receiver and sequester herein, with leave to retain an attorney at law, pursuant to Section 233 of the Domestic Relations Law, of the property of the defendant within the State of New York, whether real or personal, tangible or intangible, and of the rents and profits, issues, and income therefrom particularly the bank account of the defendant BERNARD KAMHI, in the Community National Bank, of Staten Island, N.Y., and any other bank or institution holding accounts and credits due to defendant, and the Brokerage accounts of the defendant at Trainer, Wortham & Co., New York City, N.Y., and all securities and monies and property held by said previously named brokerage firm or any other broker hereinafter discovered

holding assets of the defendant, for the account of the defendant, and due to him, and such other property as the defendant may have or may hereafter have within the State of New York, and said receiver is hereby directed to take possession of said property, both real and personal tangible and intangible and to hold the same, and to collect receive and hold rents and profits and issues and income, therefrom, until the further order of this Court, and that the said receiver have the usual powers and duties of receivers and sequestors in such cases, and it is further

ORDERED that said receiver shall deposit all moneys received by him in his own name as Receiver in American Bank & Trust Co., Montague St., Brooklyn, N.Y.

ORDERED, ADJUDGED AND DECREED, that the defendant is directed to execute and deliver a deed of his title interest in and to premises 77 Gaylord Drive, South, Brooklyn, N.Y., in favor of Shirley Kamhi, the plaintiff, by reason of his fraudulent acts and in the event that defendant fails to comply with this direction, then in that event the plaintiff may apply to the Sheriff of the City of New York, upon proper application to this Court, for the execution and delivery of the deed by the Sheriff in behalf of the defendant as directed herein, to the favor of the plaintiff, and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff

have custody of the infant issue of the marriage, Laurie C.
Kamhi,

E N T E R

J. S. C.

At a Special Term Part V of the Supreme
Court of the State of New York,
held in and for the County of
Kings at the Courthouse, 111
Livingston St., Brooklyn, N.Y.,
this 13th day of May, 1974.

P R E S E N T :

HON. LOUIS B. HELLER,
Justice.

SHIRLEY KAMHI,

Plaintiff,

Index No. 19974-73

-against-

EX PARTE ORDER

BERNARD KAMHI,

Defendant.

Plaintiff by her attorney having petitioned this
Court for an Order of Sequestration and Receivership, and the
same having been granted, ordered and adjudged in the Judgment
of Divorce herein, granted and entered the 28th day of April,
1974, and that such judgment likewise provided for the posting
and filing of a penal bond in the sum of \$50,000.00, by the
receiver appointed in said judgment, and it appearing from the
affirmation of JOSHUA S. SPARROW, Esq., affirmed May 9th 1974,
that such bond is excessive in the present circumstances of
the case, and that no surety company will be available and
will grant such a bond until the secured estate has come to
such a dollar value, and that such sureties will provide a

bond in the sum of \$25,000.00, and as such it appears that the same will satisfy the interests of justice and the Domestic Relations Law,

NOW UPON THE APPLICATION OF SPARROW and SPARROW, Esqs., JOSHUA S. SPARROW, Esq., of counsel, it is

ORDERED, that the judgment made and entered the 26th day of April, 1974, which provides for a penal bond in the sum of \$50,000.00 is excessive at this time, and that the interests of justice will be served by a reduction of the same to the sum of \$25,000.00, it is further

ORDERED, that the Receiver and Sequester herein is directed to obtain and post and file a bond in the penal sum of \$25,000.00 upon qualification and filing an execution and designation as such therein, and not as heretofore, and it is further

ORDERED, that at such time as the sequestered and received estate and property of the defendant, when so secured and received attains the sum of \$25,000.00, the receiver and sequester shall make application to this Court for further direction as to the Amount of the Bond, then to be furnished.

E N T E R

J. S. C.

SUPREME COURT, KINGS COUNTY
SPECIAL TERM PART V

SHIRLEY KAMHI,

Plaintiff,

-against-

BERNARD KAMHI,

Defendant.

JOSHUA S. SPARROW, Esq., an attorney at law duly licensed to practice law in the Courts of this state, does duly affirm under penalty of perjury as follows:-

That affirmant is the attorney for the plaintiff herein. That plaintiff has been granted a judgment of divorce by the Hon. Louis R. Heller, on the day of April, 1974, and that included in said judgment is an order and judgment of receivership and sequestration, wherein the Court fixed a bond to be provided by the receiver and sequestor in the penal sum of \$50,000.00. That after due consideration, the same has been rejected by surety companies by reason of amount, until the sequestered estate amounts to said sum. That for the above reason, the bond directed herein should be reduced to the sum of \$25,000.00 until such time as the estate is at least in said sum, at which time further bond application will be made and the insurance and surety companies will agree to secure the same in such further amount as is directed by the Court.

WHEREFORE affirmant in behalf of the plaintiff

herein respectfully prays that an ex parte order be granted herein reducing the amount of the bond value to the sum of \$25,000. until such time as the estate is in the sum requiring additional surety, and at which time further application will be made for such purpose, and for such other and further relief as to the Court will be just and proper in these circumstances.

Affirmed May 9th 1974,

JOSHUA S. SPARROW

F I L E D
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

AUG 2 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BERNARD KAMHI,

Plaintiff,

74 Civil 937

-against-

MANNIE COHEN

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION TO A
MOTION TO DISMISS

Receiver,

Defendant.

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRANK DELANEY, being duly sworn, says:

I am the attorney for the plaintiff herein. I am familiar with all the proceedings herein, and I make this affidavit on information and belief because my client is not within the State of New York but resides in Reno, Nevada, at 500 Bell Street and is now there or in the vicinity as required by his employment.

One branch of this motion being a motion to dismiss, I believe the allegations of the complaint must be deemed admitted, unless the Court in its discretion were to treat it as a motion for Summary Judgment. In that event, the plaintiff

begs leave to obtain further factual affidavits.

For the present, plaintiff will treat the motion to dismiss for failure to state a claim as a demurrer. On any disputed questions of fact, especially that of the domicile of plaintiff, he has asked for a jury trial.

Due to the New York Supreme Court rule that a matrimonial file is not open to the public, plaintiff has been unable to learn what proof was offered at the trial of the in rem divorce action brought by his former wife pursuant to the final decree therein in which defendant was appointed receiver to support the findings of plaintiff's residence and domicile in the State of New York subsequent to October 17, 1974. As far as I am informed and believe and based on much personal knowledge as well, there is no possible evidence of proof of such a fact.

The complaint was prepared by me based on the facts of which I was informed, most of which I could confirm by my personal knowledge. I believe that all the allegations of the complaint are true and correct, and should on this motion be deemed to be admitted by defendant.

But defendant has filed an affidavit on this motion and I believe caution compels me to reply by affidavit as well as by memorandum of law.

As to Paragraph 1 of Defendant's Affidavit, he did not become Receiver herein or in any way participate in the

litigation between plaintiff and his ex-wife until after the final judgment in the in rem action. As much happened in many months preceding his appointment. I do not accept his allegation that he is fully familiar with the facts and circumstances. I believe his examination at a trial will establish that statement.

As to Paragraph 2, I do not accept in all its implications that the Receiver filed his bond promptly. I assume it is admitted that he did not qualify until after final judgment in the New York divorce action and made no seizure until subsequent thereto.

As to Paragraph 4, it is the receiver's legal conclusion that the Supreme Court of the State of New York was a court of competent jurisdiction with respect to his authorization and for all purposes. But it did not have competent jurisdiction in an in rem action to authorize a sequester to make seizures therein after the final judgment in the New York action.

As to Paragraph 5, it is incorrect to say that plaintiff seeks in this action to set aside a judgment of divorce. He merely seeks relief herein from seizures by a sequester appointed after final judgment in an in rem action where there was no valid in personam jurisdiction therein in the Supreme Court of New York State, founded on service of

the summons in Nevada on a non-resident of the State of New York, as plaintiff alleges he is and was at the time, and is prepared to prove before a jury.

As to Paragraph 6, therein plaintiff recognizes and correctly describes the value of this action.

As to paragraph 7 of the moving affidavit the first sentence recognizes the essence of the plaintiff's cause of action as lack of jurisdiction in the Supreme Court of the State of New York to appoint a receiver, or sequestor, to make seizure after final judgment in an action in rem. Moreover, the defendant is quite correct that he is not a party to the divorce action, consequently, the Court therein had no jurisdiction to authorize seizures after final judgment in this in rem action, defendant at the same time conceding this is not a divorce action.

As to paragraph 8 it is true that defendant has no responsibility for the New York judgment of divorce except insofar as he must not act in contravention of law to seize property of plaintiff after final judgment in an in rem divorce action. That would constitute taking plaintiff's property without due process of law in violation of the Constitution of the United States.

As to paragraph 9 defendant acknowledges he is only appointed a receiver and sequestor, the validity of which appointment depends on the valid jurisdiction of the Court

appointing him.

As to paragraph 10, Shirley Kamhi is not a necessary party in a suit to determine if the Receiver's seizures after final judgment are based on competent authority and jurisdiction.

The defendant has chosen to rely on in personam jurisdiction in the premises, which does not exist. His affidavit, his inability to meet the basic issue and even to the extent of arguing that Special Term can ignore the law as determined in the New York Court of Appeals in the Geary and Caplan cases are self-evident. He seeks to ignore totally the jurisdictional question.

I have personal knowledge that plaintiff's decision to give up his lucrative professional practice and his career in New York was hard indeed, but I know considerations of health were seriously involved.

It is another case of a wife being willing to destroy the career, earning power and health of a husband from whom she still sought the means to be supported in luxury, which means she has wantonly destroyed.

I realize it is for the Court to decide ultimately if plaintiff is and was since October 17, 1973, or at least since December 3, 1973 a non-resident and non-domiciliary of the State of New York, but in any motion for summary judgment, the proof of the allegations of the complaint can be taken into account as to whether plaintiff deserves a trial on the issue of non-residence. I believe the facts alleged in the

complaint are true and correct. They have been carefully checked with the non-resident defendant whom on account of distance I have not seen personally while preparing the pleading, but I have sent him drafts for his approval. I am morally certain he will make an affidavit as to the facts in the complaint if this becomes a motion for summary judgment.

(Sgd.) Frank Delaney

Sworn to before me

FRANK DELANEY

this July 29th, 1974.

WILLIAM KLASS
Notary Public, State of New York
No. 41-7287000 Queens County
Certificate filed in New York County
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
BERNARD KAMHI,

Plaintiff,

:
: 74 Civil 937
:

-against-

MANNIE COHEN

Receiver,

Defendant.
:
:-----X

MEMORANDUM OF PLAINTIFF IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Plaintiff brings this action against the defendant Mannie Cohen as Receiver and Sequester appointed pursuant to a judgment for divorce against plaintiff in favor of Shirley Kamhi made and entered in the Office of The Clerk of Kings County on April 25, 1974, Index No. 19974/73. A copy of this judgment is annexed to the moving papers of defendant. The defendant filed the bond of \$25,000 required by the Court.

After the judgment was made on April 25, 1974, and entered, Receiver sought for the first time to seize property belonging to plaintiff in the State of New York, after his bond was filed on May 13, 1974, to wit; the assets of a so-called Keogh Retirement Fund of the plaintiff, including cash

and a mortgage (without a bond or note), in trust in the National Community Bank of Staten Island, New York.

This first branch of this motion of defendant is to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Under the circumstances this motion to dismiss is in the nature of a demurrer, and the facts alleged in the complaint must be deemed to be admitted.

Thus plaintiff must on this motion be deemed admitted as alleged in the complaint sought to be dismissed, to be a resident and domiciled in the City of Reno, State of Nevada, now and ever since October 17, 1973, and that he has not since had any residence or place of abode in the State of New York.

Further it must be deemed admitted that the service of summons in the New York State action in which the defendant was appointed, was based on service of summons on plaintiff in the State of Nevada on or subsequent to December 3, 1973, as appears in the judgment of divorce made in the Supreme Court of the State of New York on April 25, 1974, at which time plaintiff was alleged in the complaint herein not to be a resident or domiciled in the State of New York.

The plaintiff not being resident and domiciled in New York State but in the State of Nevada at the commencement of this action and ever since, no in personam judgment can

be recovered against plaintiff in the State of New York based on service of summons upon him in the State of Nevada. After entry of the default in rem judgment in New York on April 25, 1974, no property of plaintiff not seized prior to final judgment can be sequestered or seized legally by the defendant, nor could defendant legally sequester any property of plaintiff on May 13, 1974, or subsequent to April 25, 1974, as provided by the laws and decisions of the highest court of the State of New York.

This is no ordinary case of a husband abandoning a wife and going to Nevada "simply and solely for the purpose of obtaining" a divorce and intending to return to New York on obtaining it (See Williams v. North Carolina (2nd case) 325 U.S. 226, 236). The fact is, as alleged in the complaint, plaintiff was ordered by the Family Court of the State of New York, County of Kings, in a proceeding instituted by his wife, to stay away from the petitioner, Shirley Kamhi, at all times, and providing that any Peace Officer shall have authority to take plaintiff into custody if he is accused of violating the order. A copy of the order is annexed to the complaint.

Aware of his experience in this Family Court action, in which plaintiff was found guilty of striking and throttling the petitioner therein at Saratoga Springs, New York, May 20, 1974, in a corridor of the Gideon Putnam Hotel, in which hotel

building plaintiff denied, and still denies, he has even been at any time, without there being any witnesses thereto, or any complaint by petitioner to the authorities in Saratoga Springs, or the management of the Gideon Putnam Hotel or the New York State Park, plaintiff was forced to the decision that his personal liberty was endangered anywhere in the State of New York by a further trumped up charge, and decided he should not endure such a risk to his personal liberty. Accordingly he gave up his residence and domicile in the State of New York and established such residence and domicile in the State of Nevada on October 18, 1973, and at the same time gave up his well-established medical practice in New York City as a specialist in urology and urological surgery, from which with an equal partner, Marcel Horowitz, M.D., he had gross earnings of \$275,000 annually in 1971.

That practice has been destroyed, has not been sold, and no longer exists.

This complaint does not institute a matrimonial action but is brought against the Receiver for making an illegal seizure. It is not an action to set aside a divorce decree obtained by Shirley Kamhi. True the plaintiff obtained a valid divorce in the State of Nevada on December 21, 1973, which is entitled to full faith and credit under the United States Constitution. It is acknowledged by plaintiff that the Nevada action was an in rem action. But seizure of New York assets of plaintiff in the

in rem divorce action is only permitted when the seizure by the sequester is made prior to the wife's final in rem decree in New York. This is the holding in the leading case of Geary v. Geary, 272 N.Y. 390, with an opinion by Judge Lehman.

The decision is confirmed and followed in a per curiam decision in Matter of Caplan v. Caplan (July 1972), 30 N.Y.2d 941, 943, which definitely states the seizure of a nonresident defendant's property must be made prior to final judgment. These are the words of the Court of Appeals therein at p. 943:

"So too, through the presence of the child in the State provides a jurisdictional basis for the custody award, the right to apply a nonresident defendant's property in satisfaction of the jurisdiction is fixed, upon its seizure at some time prior to final judgment (Geary v. Geary, 272 N.Y. 390, 399, supra). In this case, since nothing was done prior to judgment, the court could not interfere with the property of a nonresident defendant."

The Receiver appointed after final judgment has no power to seize the plaintiff's property after the final New York judgment under the law of the State of New York as enunciated by its highest court.

POINT I

PLAINTIFF HAS BEEN A NONRESIDENT OF THE STATE OF NEW YORK SINCE OCTOBER 17, 1973 AND HAS SINCE THAT TIME RESIDED AND BEEN DOMICILED IN THE STATE OF NEVADA.

On a motion to dismiss for failure to state a claim

for relief, the Court must give the pleader every reasonable benefit of potential proof and plausible inference. Spindel v. Spindel (1968), United States District Court, Eastern District of New York. 283 Fed. Supp. 797, 814.

It is clearly alleged in the complaint that plaintiff gave up his residence and domicile in the State of New York on October 17, 1973, and has since been a resident of the State of Nevada. He also gave up a previously lucrative professional practice in urology and urological surgery in New York, and has set forth in his complaint the compelling reasons for this decision. He had not returned to live in New York State, has no abode therein; he has sought and obtained a license to practice his profession in Nevada, and is employed in that area.

There is no proof before this Court to contradict this assertion. On the contrary, the decree, which we assert can be no more than in rem, and not in personam, because process was served on plaintiff at his home in Nevada.

That he has left New York and its jurisdiction is found by the New York Supreme Court, Kings County as a fact in paragraph Sixth of the Findings of Fact in the in rem judgment against defendant in New York in these words:

"Sixth: That defendant departed the jurisdiction of the State of New York, a place of his actual residence and domicile, and went to the State of Nevada for the purpose of obtaining a divorce."

There is also alleged in detail in the complaint the compelling reasons of the plaintiff herein establishing a new residence in Nevada.

The following Finding of Fact, paragraph Seventh, illustrates the truth of plaintiff's allegation in his complaint numbered V. It finds that he was outside of the State of New York from October 17, 1973 until the date of the inquest, February 6, 1974 (the fact is that he has never returned to New York). It continues on to find he operated and maintained a medical doctor's practice of medicine at 61 Eastern Parkway, Brooklyn, New York. It was there he formerly maintained the principal offices of the dissolved partnership with Dr. Horowitz. Dr. Horowitz was gone as was their employee Dr. Josephy and no attempt was made to explain how plaintiff could maintain a practice as a urological surgeon for nearly four months in Brooklyn without assistants and without being there. But it was apparently not disclosed at the trial that in December 1973, although the minutes are not available to plaintiff, but are available to the former wife, the wife took possession of these offices, and

removed voluminous records and appointment books and many other important and necessary things essential to such medical practice.

Plaintiff gave up his New York residence and domicile which in addition to all else had so affected his health that it was impossible for him to carry on single handed his profession in New York, and established residence in Nevada. He has never returned to live in New York, and there is not an iota of evidence or proof that he ever had or now has any such intention. He is employed at a much reduced compensation outside of New York. Incidentally, his interest in the home which was an estate by the entirety has been ordered confiscated by the in rem judgment of divorce. The wife has converted \$50,000 cash provided by him out of past earnings in trust for his children, which trust she ignores and claims as her own personal asset. She had threatened to sell his practice but was unsuccessful. The only thing defendant could attempt to seize even after final judgment is his interest in the Keogh Retirement Fund which the Receiver, the defendant Mannie Cohen appointed in the final judgment of the wife, based on service in Nevada weeks after plaintiff gave up his New York residence, has attempted to seize after the final judgment entered by the wife. There is no

proof that he has any large assets remaining due to the seizures by the wife and the financial obligations that devolved upon him in the dissolution with Dr. Horowitz.

Paragraph Ninth of the in rem judgment of divorce ~~for~~ ^{EXHIBIT} the ~~excerpt~~ annexed to his motions papers, contains a Finding of Fact that he was in Nevada, which confirms the finding of the Nevada Court that he resided there without any indication that he would return since October 18, 1973 to December 21, 1973 inclusive, upon which jurisdictional fact the Nevada Court then granted him a divorce. The complaint herein alleges ^{it} ~~and~~ ^{it} must be deemed admitted that he continued to maintain his residence and domicile there to the present, which is the fact.

Finding of Fact numbered FIFTEENTH that states that the wife had not been served with a judgment in any other jurisdiction for divorce could only have been made because the wife concealed and suppressed the service by mail of the Nevada decree of December 21, 1973 with notice of entry. Whether she so testified at the inquest is unknown to plaintiff as the minutes of the trial are not available to plaintiff under the Rules of the Court.

As plaintiff elected to move his residence to Nevada for many reasons, and not simply and solely for purpose of obtaining a divorce, and then immediately returning to resume his life in New York, although that might have been one stick in the bundle, as long as he never intended to return to live in New York, and to that end gave up his entire successful career and practice in New York, to begin all over,

and reside elsewhere, he rendered himself unable to retain and completely lost his New York domicile.

(See Williams v. North Carolina 325 U.S. 225, 236)

POINT II

THE INSTANT ACTION HAS NO RELATION
TO THE MARITAL STATUS OF THE PARTIES
AND IS NOT EVEN AN ACTION BETWEEN THE
EX-HUSBAND AND WIFE.

The parties are validly divorced. The in rem Nevada judgment was valid as to their status. Williams v. North Carolina (1st case) 317 U.S. See confirmation 325 U.S. 226, 236.

There is no dispute as to the divorced status of the parties. The in rem judgment obtained by wife in the Supreme Court Kings County confirmed the status of both as divorced.

The critical question in the New York proceedings is jurisdiction of the New York Court to direct sequestration after final judgment and that depends on domicile.

POINT III

THIS IS NOT A MATRIMONIAL ACTION.
SPINDEL V. SPINDEL, UNITED STATES
DISTRICT COURT, EASTERN DISTRICT OF
NEW YORK 283 F. SUPP. 797 (1968).

A federal court is not deprived of jurisdiction merely because parties are husband and wife or controversy might be termed a "marital dispute." A fortiori it is not deprived of jurisdiction to prevent a Receiver with-

out valid authority to seize property from making such a seizure.

Moore Federal Practice par. 57.21 (21) pp. 3125-3126.

The discharge of the duty to review the judgment of a State Court in respect to jurisdiction requires the review by the United States Supreme Court of that rather elusive relation between person and place which establishes domicile.

Williams v. North Carolina 325 U.S. 226, 233.

"State Courts can not avoid review by this Court of their disposition of a constitutional claim by casting it in an unreviewable finding of fact. Morris v. Alabama 294 U.S. 590."

Williams v. North Carolina 236 U.S. 226, at p. 236 last paragraph.

POINT IV

THE BASIC PREMISE OF FEDERAL JURISDICTION BASED UPON DIVERSITY IS THAT THE FEDERAL COURTS SHOULD AFFORD REMEDIES WHICH ARE COEXTENSIVE WITH RIGHTS CREATED BY STATE LAW AND ENFORCEABLE IN STATE COURTS.

Spindel v. Spindel, supra. Burford v. Sun Oil Co., 319 U.S. 315, 336-337.

There is diversity of citizenship here as plaintiff lives and is domiciled in Nevada and defendant is a resident of New York. The jurisdictional amount is

over \$10,000, as the amount in controversy is alleged to be at least \$25,000, confirmed by the posting of a \$25,000 bond by the Receiver.

POINT V

IT IS THE LAW OF THE STATE OF NEW YORK ENUNCIATED BY ITS HIGHEST COURT, THE COURT OF APPEALS, THAT SERVICE OF PROCESS ON A NON-RESIDENT AND NON-DOMICILARY OF THE STATE OF NEW YORK OUTSIDE THE STATE OF NEW YORK, HERE IN NEVADA, STATE OF DEFENDANT'S (PLAINTIFF HERE) RESIDENCE, CONFERS NO JURISDICTION ON THE COURTS OF THE STATE OF NEW YORK TO ORDER SEIZURE OR SEQUESTRATION OF NEW YORK ASSETS OF THE NON-RESIDENT DEFENDANT AFTER FINAL JUDGMENT IN A NEW YORK DIVORCE CASE.

Geary v. Geary, 272 N.Y. 390.

Caplan v. Caplan 30 NY 20 941, 943

Matthews v. Matthews 247 NY 32, 34

In Matthews v. Matthews, supra, the Judge Andrews writing for the unanimous Court of Appeals, held at page 34:

The claim of the appellant is that while the decree of separation is valid here, the decree appointing a receiver of his property is void. He is, as has been said, a non-resident. No valid proceedings under Civil Practice Act, section 1171-a, were taken. Over this property the court has never obtained any jurisdiction whatever.

This is so. In actions for divorce or separation brought by one of our citizens against a non-resident service by publication does, so far as we are concerned, give our courts full

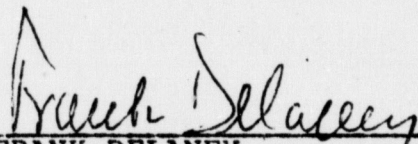
POINT VI

THE FORMER WIFE OF PLAINTIFF IS
NOT A NECESSARY OR EVEN A PROPER PARTY.

No relief is sought against the former wife in this action. She is not even responsible for the illegal seizure alleged against the defendant. Receiver acting for the Court, his attorneys do not represent the former wife as far as the record shows. It is not the in rem judgment of the New York Supreme Court in Kings County that is now the subject of attack by plaintiff, but the illegal acts of the defendant receiver founded on erroneous interpretation of the effect and authority of that judgment under the laws of New York and the United States Constitution.

CONCLUSION

THIS CASE IS NOT EVEN A DOMESTIC RELATIONS PROBLEM BUT ENTIRELY DEPENDS ON THE LEGAL AND CONSTITUTIONAL INVALIDITY OF THE ACTION OF A STRANGER TO THE MARRIAGE OR THE MARITAL DISPUTE, APPOINTED AS A RECEIVER AND SEQUESTER, WHO HAS SEIZED PROPERTY IN VIOLATION OF LAW AND WITHOUT DUE PROCESS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.


FRANK DELANEY
Attorney for Plaintiff
750 Park Avenue
Borough of Manhattan
New York, New York 10021
Tel. TR 9-4600

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
:
BERNARD KAMHI, :
:
Plaintiff, :
:
-against- :
:
MANNIE COHEN, :
Receiver, :
:
Defendant. :
:
----- X

74 Civil 937

DEFENDANT'S REPLY MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

This memorandum is submitted in reply to
plaintiff's memorandum in opposition to defendant's motion
to dismiss.

POINT I

"IN PERSONAM" JURISDICTION WAS
OBTAINED AGAINST THE PLAINTIFF
IN THIS ACTION AS DEFENDANT IN
THE MATRIMONIAL ACTION IN THE
SUPREME COURT OF THE STATE OF
NEW YORK, COUNTY OF KINGS.

That plaintiff has repeatedly asserted
that jurisdiction was "in rem" as far as the matrimonial ac-
tion was concerned in the State Court. This is totally in-
correct.

Domestic Relations Law, Section 232 sets

forth the requirements for personal delivery of the summons to the defendant, whether within or without the State of New York, and sets forth the requirements for the affidavit of service.

CPLR Section 308 sets forth the basic requirements with reference to personal service upon natural persons. It is conceded that there are certain exceptions made in that section with reference to matrimonial actions, nevertheless, CPLR Section 313 provides for service without the state giving personal jurisdiction, therefore, the Judgment of Divorce that was annexed to the moving papers herein satisfies these requirements and sets forth appropriate jurisdictional grounds that are in fact "in personam" jurisdictional standards.

Therefore, the judgment on the face of it is jurisdictionally "in personam". Consequently, plaintiff can only litigate the question of jurisdiction with SHIRLEY KAMHI who was the plaintiff in the state action. It is obviously illusory for plaintiff to try to litigate the jurisdictional question with a third party who is in fact only the receiver herein.

Nevertheless, plaintiff seems to elude the fact that he is not concerned with the jurisdiction of the State Court but only seeks to attack the receiver's ability to secure plaintiff's property within the State of New York

because the seizures are improper as taking place after the rendering of an "in rem" judgment.

As we have set forth in the statutes hereinabove cited, the judgment is in fact "in personam." Nevertheless, if there is a question as to the quality of jurisdiction that the Supreme Court, Kings County had, it must be litigated with the appropriate party, and that party is SHIRLEY KAMHI.

POINT II

THE DEFENDANT HEREIN, THE RECEIVER, PURSUANT TO THE JUDGMENT OF DIVORCE RENDERED BY THE STATE OF NEW YORK, MAY SEIZE PROPERTY AFTER THE JUDGMENT OF DIVORCE IS GRANTED.

It is not claimed that the receiver herein attempted in any way or in fact had the ability to seize any property in the State of New York belonging to the plaintiff before the rendition of the Judgment of Divorce. In fact, it is quite impossible since the receiver was not appointed until such time as the Judgment of Divorce was entered, and subsequently, and until he filed his bond, had no ability to act as receiver and sequester. Nevertheless, all proceedings effected by the receiver from the date of qualification to the present date, are appropriate.

Plaintiff, mistakenly, is relying upon an assumption that the sequestration is pursuant to Domestic Relations Law, Section 233, that section deals with sequestra-

tion of defendant's property in an action for divorce, separation or annulment where defendant cannot be personally served. There can be no question in this matter that plaintiff herein (defendant in Supreme Court, Kings County) was personally served.

Therefore, it is obvious that the sequestration is pursuant to Domestic Relations Law, Section 243, which reads as follows:

"Where a judgment rendered or an order made in an action in this state for divorce, separation or annulment, or for a declaration of nullity of a void marriage, or a judgment rendered in another state for divorce upon the ground of adultery, or for separation or separate support and maintenance for any of the causes specified in section two hundred, or for relief, however designated, granted upon grounds which in this state would be grounds for annulment of marriage or for a declaration of nullity of a void marriage, upon which an action has been brought in this state and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the Court, in its discretion, also may direct him to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor, or to pay any sum of money for the support and maintenance of the children or the support and maintenance of the wife during the pendency of the action, or for her counsel fees and expenses which he is required to pay by a judgment or order, the court may cause his personal property and the rents and profits of his real property to be sequestered and may appoint a receiver thereof. The rents and profits and other property so sequestered may be applied, from time to time, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice

requires; and if the same shall be insufficient to pay the sums of money required, the court, on application of the receiver, may direct the mortgage or sale by the receiver, under such terms and conditions as it may prescribe, of sufficient of his real estate to pay such sums."

It is interesting to note that although plaintiff raises many questions of which transpired herein, and was pointed out in the affidavit, that he in fact has access to the file in the Supreme Court, Kings County. The defendant in this action must respectfully point out to the Court that precisely what transpired before final judgment is not knowledge that defendant is privy to simply because pursuant to statute the defendant herein does not have a right to examine and copy the file.

Plaintiff's memorandum of law no also raises the jurisdictional question and the claims that the seizure was improper because it was not done prior to entry of final judgment by citing various cases. It is respectfully submitted that these cases are not at all in point and are totally inapplicable to this situation.

Plaintiff cites GEARY v. GEARY, 272 NY 390; in that case the defendant did not reside in the State of New York. Plaintiff served her summons pursuant to an order for personal service outside the state or by publication. There is no question that the jurisdiction in GEARY was "in rem" only. In the instant case before the Supreme

Court, Kings County, there is no question that jurisdiction was "in personam" jurisdiction because the defendant was a resident of New York outside of the state at that time. It is also interesting to note that the Court in GEARY v. GEARY, supra did in fact hold that the seizure was proper.

Plaintiff also relies on CAPLAN v. CAPLAN, 30 NY 2d 941; the CAPLAN case is very interesting because it arose in the Family Court; CAPLAN v. CAPLAN, supra at P943, the Court said, as follows:

"Since the action is not one to alter or affect marital status of the parties (CPLR 103), the court's jurisdiction to order maintenance and support payments on behalf of the estranged spouse depends upon seizure of the non-resident defendant's property prior to the commencement of the action." (emphasis supplied).

It is obvious that there is substantial differences between the above cited case and the instant situation, in that the action in the Supreme Court, Kings County was certainly an action to alter or affect the marital status of the parties. The Caplan case has absolutely no bearing on the instant situation.

Plaintiff also relies on SPINDEL v. SPINDEL, 283 F.supp. 797. The substantial difference that counsel for the plaintiff does not point out is that in the Spindel case the husband and wife were subjected to Federal review of jurisdictional question. Counsel uses the Spindel case as a basis for the theory of jurisdiction, nevertheless, in this

action he seeks to bring in a third party who was appointed pursuant to judgment as a receiver and thereby seeks to attack only part of the judgment or claims to do so. Plaintiff also relies on MATTHEWS v. MATTHEWS, 247 NY 32, but fails to point out that the Matthews case deals only with a non-resident and is totally different from the situation confronting this Court where the plaintiff herein (defendant in Supreme Court, Kings County) was a resident that was out of the state at that time.

The whole of the proposition concerning service on a domiciliary outside of the state rendering "in personam" jurisdiction is well covered in CARMODY WAIT 2nd 25:8,

Counsel for plaintiff also relies extensively on WILLIAMS v. NORTH CAROLINA, 325 U.S. 225 and an earlier case bearing the same title. The Williams case concerned the non-recognition of a Nevada divorce decree rendered after service by substituted service which subsequently culminated in criminal charges of bigamy being brought against the parties to the Nevada divorces. Principally, the issues in the Williams case were that of full faith and credit and are not really related to the instant cause in any way, shape or form.

Plaintiff further relies on NORRIS v. ALABAMA, 294 U.S. 590. Counsel must confess that the significance of the Norris case is lost on him - the case involved

the exclusion of Negroes from selection to Grand Juries. I suggest it is important to note that the attorney for Norris was Samuel S. Liebowitz, whom I take to be the same Samuel S. Liebowitz who subsequently rose to eminence as Supreme Court Justice in the State of New York. I admit that it is always nice to look back to the year 1935, to the earlier part of the Honorable Justice's career, nevertheless, the Norris case does not relate, in any way, to the issues at bar in the instant case.

Plaintiff also relies on BURFORD v. SUN OIL CO., 319 U.S. 315, and in fact sets forth a quote at Ps. 336-337; again Burford had nothing to do with the case at bar but plaintiff's counsel fails to point out, as is appropriate, that he is citing from a dissenting opinion; however, it is a dissent of the Honorable Felix Frankfurter and should be read from time to time.

It is obvious that if plaintiff wants to sustain its lawsuit and wishes to litigate, whether at the time the plaintiff herein was served in the State Court action with process, as to whether he was a resident or not, he should do so either in the State Court or in an action in this Court with SHIRLEY KAMHI.

C O N C L U S I O N

THE MOTION HEREIN SHOULD BE GRANTED AND
THE COMPLAINT DISMISSED FOR FAILURE TO STATE A CAUSE
OF ACTION AGAINST THE DEFENDANT UPON WHICH RELIEF CAN
BE GRANTED, OR IN THE ALTERNATIVE, THE ACTION SHOULD BE
DISMISSED BECAUSE OF FAILURE TO JOIN A NECESSARY PARTY
DEFENDANT.

Respectfully submitted,

KADANOFF AND HAUSSMAN, P.C.

By: _____

ARTHUR J. HAUSSMAN
Attorneys for Defendant
Office & P.O. Address
50 Court Street
Brooklyn, New York 11201
(212) 875-6706

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BERNARD KAMHI,

Plaintiff,

Index No.
74 Civ. 937

-against-

MANNIE COHEN, Receiver

REPLY AFFIDAVIT

Defendant.

-----X

STATE OF NEW YORK) SS.:
COUNTY OF KINGS)

ARTHUR J. HAUSSMAN, being duly sworn,
deposes and says:

That I am the attorney for the defendant and movant herein. That I make this affidavit because it generally deals with legal matters and factual matters within my knowledge.

That plaintiff's attorney has made some serious misstatements of fact which must be brought to the attention of the Court. Firstly, on the second page of his affidavit he states that the plaintiff has been unable to learn what proof was offered at the trial of the divorce action which he further characterizes as an "in rem" divorce action. Domestic Relations Law, Section 235, clearly states

that a party to the action or an attorney or counsel of a party who had appeared in the cause may view and copy the file or an order of the Court may be secured. That the statements made by plaintiff's counsel are merely a misplaced method of avoiding the review of the file and the appropriate conclusion that jurisdiction was in fact "in personam" in that action in the Supreme Court of the State of New York, County of Kings.

Plaintiff's attorney, on the second page of his affidavit, also states that he does not accept the allegation of the defendant that he is fully familiar with the facts and circumstances. That is precisely the point; the defendant-receiver herein claims only knowledge with reference to those proceedings personally concerning him and which took place after the entry of a judgment. Nevertheless, plaintiff has commenced this action to attach part of a decree (and your deponent verily believes to effectively set aside, in toto, against someone that is only ancillary to the divorce action.

The thrust of the affidavit submitted by plaintiff's attorney is that there was no valid "in personam" jurisdiction and therefore the receiver is action improperly.[?] As is pointed out in the memorandum of law that was served simultaneously herewith, plaintiff has not only misstated the law completely but is also trying to litigate the issue

against the wrong party. Quite frankly, I believe that this is a deliberate design of the plaintiff, for in the event that SHIRLEY KAMHI was made a party to this action there would probably be no question whatsoever as to the validity of the decree granted by the Supreme Court, Kings County, and it is also obvious that any further jurisdictional questions that might be raised against SHIRLEY KAMHI would disappear in that action because this action was brought by the plaintiff so that plaintiff could "have his cake and eat it"; he wants to litigate the question of the jurisdiction of the Supreme Court of the State of New York, but he prefers not to litigate this question with SHIRLEY KAMHI, the plaintiff in the Supreme Court action.

I respectfully submit that this is a patent absurdity and therefore the actions should be dismissed.

Plaintiff's attorney's affidavit in opposition to the instant motion also makes some very personal statements seeking to pluck upon the heartstrings of the Court. The attorney makes nonsense allegations as to plaintiff's decision to give up a purported lucrative career in New York and that SHIRLEY KAMHI was intent on destroying the career, earning power and health of the plaintiff.

Plaintiff's attorney, in his memorandum of law, also seeks to set forth further facts that do not belong in a memorandum of law. The precise questions as to plaintiff's purported intentions in leaving the jurisdiction and supposedly

becoming a resident and domiciliary of the State of Nevada can only be litigated in a suit between plaintiff and SHIRLEY KAMHI because, based upon plaintiff's wanton allegations in the memorandum of law, there can be no question whatsoever that he, in fact, seeks to set aside all parts of the judgment of divorce that would require a foundation of "in personam" jurisdiction. He knows that he cannot litigate the validity of the divorce itself simply because the statutes are clear as to "in rem" jurisdiction being founded upon the marriage as to res itself.

WHEREFORE, your deponent respectfully prays that this action be dismissed because the complaint fails to state a claim against the defendant upon which relief can be granted, or in the alternative, on the grounds that the plaintiff has failed to join an indispensable party, to wit: SHIRLEY KAMHI.

A/ AJH

ARTHUR J. HAUSSMAN

Sworn to before me
this 16th day of August, 1974

PHILIP G. KADANOFF
Notary Public, State of New York
No. 24-7134250
Qualified in Kings County
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
BERNARD KAMHI,

Plaintiff,

-against-

MANNIE COHEN, Receiver

Defendant.

:

:

:

:

:

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

FRANK DELANEY, being duly sworn, says that he is the attorney of Record for plaintiff Bernard Kamhi in this action in the United States District Court for the Eastern District of New York, 74 Civ. 937, against Mannie Cohen, Receiver Defendant.

In no other respect do I represent Dr. Kamhi, who is a resident of and domiciled in the State of Nevada. He is represented there by Robert R. Herz, Esq., a member of the Nevada Bar.

I must correct Mr. Hausmann's error in accusing me of a misstatement of fact. I wish, before making so serious a charge, he might have made himself more familiar

with the facts of the cause in the Supreme Court, Kings County, Index No. 19974-73; Shirley Kamhi, plaintiff, Bernard Kamhi, defendant.

I was never attorney for Bernard Kamhi in that action at any time, nor did I participate in the action at any time, in any way.

Dr. Kamhi had discharged me amicably, and retained Eleanor B. Alter, Esq., the daughter of the Chief Judge of the Court of Appeals, as his attorney, although not to appear in that action.

Thereafter, Dr. Kamhi formally retained one George Goldberg, Esq., whom I have never met, nor to whom I have ever spoken. Because of his inquiry at the Kings County Clerk's Office about the file in that case, and a retainer in writing from defendant, the plaintiff urged that he, the attorney, appeared generally for defendant, Bernard Kamhi. I have been told that plaintiff Shirley Kamhi's attorneys were so incensed when Mr. Justice Heller ruled that Mr. Goldberg has not appeared generally, that they sought to have the case sent to another Justice.

It was sufficiently serious an issue that Mr. Justice Heller made an explicit finding that Mr. Goldberg had not appeared generally for defendant

Bernard Kamhi in the in rem judgment he rendered.

Thus I was forewarned against subjecting myself to any such entrapment or allegation.

Nevertheless the effort to involve me as alter ego for plaintiff herein, for personal service upon him in New York by actions by Shirley Kamhi continues.

It is now erroneously urged by said Shirley Kamhi that I have so subjected myself by bringing the instant action against Mannie Cohen, Receiver, pursuant to Section 303, Civil Practice Law and Rules of the State of New York.

The Statute reads in the relevant first paragraph as follows:

"Section 303. Designation of attorney as agent for service.

The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears as agent, during the pendency of the action, for service of a summons pursuant to section 308, in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court."

The significant clause is, "xxx in which such a person is a defendant and another party to the action is

a plaintiff xxx". Shirley Kamhi was not a party to the action brought in this United States Court.

Not only had I never "appeared" in the in rem divorce action, but I had absolutely nothing to do with that action.

And because there has been so concerted an effort by the attorneys for plaintiff to achieve through me in personam jurisdiction over Bernard Kamhi, a non-resident and nondomiciliary in New York in this action, I was not prepared to seek any order of the Court in that divorce proceeding to see the file lest it might be interpreted to have been an appearance generally by me for Bernard Kamhi, defendant.

This compels plaintiff to repeat that this is a motion to dismiss and the allegation of plaintiff that he is not and was not a resident or domiciled in the State of New York and is a citizen of the State of Nevada must be taken to be an indisputable fact on the motion to dismiss.

On the expected trial, the residence and domicile of plaintiff may be an issue of fact. But as it is in the power of the Court to treat such a motion as this as a motion for summary judgment, it seems appropriate to

file certain excerpts of an affidavit of the plaintiff's divorced wife in that in rem divorce action conceding that plaintiff is a nonresident and nondomiciliary of the State of New York, and that she did not obtain an in personam judgment in New York, or even try to obtain anything but only an in rem judgment in New York.

In an affidavit sworn to by her on July 23, 1974 in the in rem divorce action, Shirley Kamhi v. Bernard Kamhi, Shirley Kamhi stated:

"Lastly and perhaps as important is the fact that the plaintiff deponent did not seek to obtain a personam judgment when she obtained this one. She thought and did recover jurisdiction of the defendant's property in the State of New York, from which he she sought jurisdiction and ultimately payment."

The plaintiff Shirley Kamhi further concedes that her ex-husband is a nonresident on the first page of the affidavit in which she took her oath in the in rem action on July 23, 1974, in the in rem divorce action #19974-73. These are her words:

"xxx he has vacated his alleged residence in Nevada and has taken a new home in Sacramento, Calif., and has commenced work as a physician for a health organization at Sacramento, Calif., and has had himself listed in the telephone directories of that stated city as a physician. That deponent has called said address and telephone number and has heard the defendant's voice on the telephone."

While she is in error that he has moved his domicile to Sacramento, California, he certainly has not resumed any residence in New York. He went to California temporarily to work until he can find proper beneficial openings in Nevada. He still maintains his residence at 550 Bell Street, Reno, Nevada.

The reason for these damaging admissions by the former wife of defendant, which of course was prepared by her counsel, is to further an attempt to obtain through this action in this United States Court for the Eastern District of New York an in personam judgment over plaintiff by serving myself as the attorney herein for plaintiff in this action and so achieving in personam judgment over plaintiff by service on myself.

The statute the ex-wife relies upon is Section 303, Civil Practice Law and Rules of the State of New York, to the effect that if an attorney brings a suit against a defendant in New York State, New York State will find in personam jurisdiction over the plaintiff by serving the attorney. CPLR Section 303 is inapplicable. No suit in New York State, as the statute explicitly provides as a condition therein, has been brought against the ex-wife in New York. This case in the United States District Court is

against Mannie Cohen, Receiver Defendant.

Secondly, New York may make such rules as it likes with respect to litigation, but it cannot base New York State jurisdiction for the service on an attorney as involuntary designee for his client in a United States Court action, as well as on behalf of a party he did not sue.

But as a condition to even suggesting application of CPLR 303, is its explicit condition that it refers to an action in the state "not subject to personal jurisdiction."

So in order to try and involve me for the jurisdiction over Dr. Kamhi which we both concede does not exist, advisers of the ex-wife have now conceded the true fact that in the action in the Supreme Court of the State of New York for Kings County #19974-73, Shirley Kamhi, plaintiff, against Bernard Kamhi, defendant, plaintiff has no in personam jurisdiction of the defendant there.

From the copy of the in rem Judgment of Divorce which defendant has annexed to his motion, I find the following:

"Conclusion of Law

First. That jurisdiction has been obtained as required by Section 230 of the Domestic Relations Law."

Section 230 of the New York Domestic Relations Law embraces the requirements for an in rem judgment. That action reads as follows:

"Section 230. Required residence of parties to marriage in action for annulment or separation.--
An action to annul a marriage, to declare the nullity of a void marriage, or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.
2. Where the parties were married within the state and either the plaintiff or the defendant is a resident thereof when the action is commenced.
3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action."

Consequently it embraces in rem judgments specifically, so the Conclusion of Law in no way verifies this judgment as in personam.

It is noticeable that the verified complaint in the action in which judgment granted is not the same complaint allegedly served on October 4, 1973.

It is verified not on October 18, 1973, but on December 20, 1973. The attorneys are different. In the

papers left at my office, the attorneys were Sparrow & Sparrow. In the action in which judgment for divorce was entered on April 28, 1974, Shirley Kamhi, plaintiff, against Bernard Kamhi, defendant, Index No. 19974-1973, the attorneys are Koenig and Sparrow, Esqs.

I suppose misstatements of the law with which I am accused really mean that I disagree with the affiant who seems to be directing a personal attack upon me.

I say there is no in personam judgment because plaintiff is a nonresident and nondomiciliary of New York and was served with process in Nevada.

As for Mr. Hausmann's belief in the deliberate design of the plaintiff, I do not know, but I do know I was retained to set aside an illegal seizure by a Receiver, and for that alone.

I agree that only in a trial can the jurisdictional question be determined resting clearly on the nonresidence and foreign domicile of Bernard Kamhi when served with process in Nevada.

The attack on me seems pusillanimous when Shirley Kamhi has admitted her judgment of divorce is in rem by her intentional design as above set forth, and that only now, after judgment, is she trying to get in personam by serving me.

I take little offense, as the affidavit attacking me seems to follow the principle that if you have a weak case, try the District Attorney.

Frank Delaney
FRANK DELANEY

Sworn to before me this
27TH day of August, 1974.

State of New York
County of New York

Subscribed and sworn to before me
this 27TH day of AUGUST 1974

George N. Lorenz

GEORGE N. LORENZ
Notary Public, State of New York
No. 41-2404135
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1975

77A



**VETERANS ADMINISTRATION
HOSPITAL
1000 LOCUST STREET
RENO, NEVADA 89502**

July 15, 1971

IN REPLY
REFER TO:

654/11

Bernard Kamhi, M.D.
702 Woodside Lane East
Sacramento, CA 95825


Dear Doctor Kamhi:

I received your letter yesterday asking about a urologist position at our hospital. We do have consultant funds which could be used for a full time staff urologist.

I urge that you contact me very soon. Dr. Black, Dr. Shapiro and I would like to talk in depth to you about the position here.

Please phone me one day early next week (1:30 p.m. is a good time) so that we can set up a mutually convenient time for you to visit with us.

Sincerely,


PAUL R. JENSEN, M.D.
Chief of Staff

cc:
Dr. Black
Dr. Shapiro

9/6/74

Paul H. Jensen M.D.

1 a Hospital

1000 Lakeside Street

Reno, Nevada 89502

Dear Doctor Jensen,

I received your letter dated July 11, 1974. I will make arrangements to meet with you this weekend if you are available to discuss the problem.

Thank you.

Sincerely,
Bruce L. Jensen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BERNARD KAMHI,	:	
	:	74 Civil 937
Plaintiff,	:	
-against-	:	
MANNIE COHEN	:	
AS RECEIVER,	:	
Defendant.	:	

-----X

PLAINTIFF'S MEMORANDUM IN REPLY
TO DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

This is a motion to dismiss the complaint, but the moving defendant seeks in his Brief to ignore the allegation of the complaint, and its effect, that Kamhi was a nonresident and nondomiciliary of New York at that time, the commencement of his wife's divorce action, to wit:

"xxx was not domiciled, nor residing in, nor living in, nor staying in the State of New York on October 13, 1973, when his wife, Shirley Kamhi, alleges she commenced an action against him in New York State to set aside a Fraudulent Conveyance, to Recover Title to Real Property, and an Action for an Absolute Divorce, nor did he ever live or reside at the address his wife alleged as his abode, 61 Eastern Parkway, Brooklyn, New York, but the same was solely

his professional offices, formerly of the partnership with Dr. Horowitz, nor did he live at 1390 Broadway, Hewlett, Long Island, New York, which was a branch professional office while the partnership with Dr. Horowitz was existing."

and states without proof that defendant was a resident of New York outside the state at that time.

The question raised in the preliminary discussion on the original return day of defendant's motion to dismiss, August 2, 1974, that this case being one from which United States Courts abstain because it arises out of a marital cause, is not even briefed by the defendant. This is not a case to alter the marital status, and the United States Supreme Court has found it a duty to pass on the jurisdictional aspects arising out of domicil. The divorced wife is not a party and there is no relief sought against her.

POINT I

DOMICIL IS THE BASIS OF JURISDICTION
AND THE UNITED STATES COURTS ARE BOUND
TO DECIDE JURISDICTIONAL MATTERS
AFFECTING A CITIZEN.

Williams v. North Carolina, 325 U.S. 232.

Davis v. Davis, 305 U.S. 32.

As stated in the Williams case at p. 231:

"For domicile is the foundation of probate jurisdiction as it is that of divorce."

Moreover, the Williams case holds it is the duty of the United States Courts to determine these jurisdictional questions and the domicile which lies beneath them.

The Court said therein at p. 229:

"Under our system of law, judicial power to grant a divorce, jurisdiction, strictly speaking, is founded on domicile."

And at p. 236:

"State Courts cannot avoid review by this Court of this disposition of a constitutional claim by casting it in the form of an unreviewable question of fact. Norris v. Alabama, 294 U.S. 587, 590."

Previously in Davis v. Davis, 305 U.S. 32, the United States Supreme Court found the United States Courts exercised as a duty its right to rule on matters collateral to an original divorce.

The Davis case did in fact affect the marital status of the parties, but the Supreme Court of the United States exercised its jurisdiction because the controversy related clearly to a matter of jurisdiction based upon domicile. The Supreme Court thereupon upheld

the petitioner's decree of absolute divorce from the Virginia Court.

It is much more of a case of marital status than the instant case where no relief is asked against one of the parties to a concedely valid divorce, but only against a receiver appointed by the divorce court who exceeded his authority.

It would seem this was sufficient answer to any claim of abstention by United States Courts from passing on the lack of valid authorization of the acts of a Receiver, because his appointment proceeds from a marital decree, which case does not include the plaintiff therein as a party.

This is not a case to alter or affect the marital status of the parties and the United States Courts are bound to be pass on the jurisdiction which is founded on domicil. This action questions the constitutionality of a seizure by a Receiver after an in rem judgment is entered, and is not an action to alter or affect the marital status of the parties. They are divorced, which no one contests.

POINT II

PLAINTIFF SHIRLEY KAMHI IN THE
MATRIMONIAL ACTION DENIES UNDER OATH
THAT SHE OBTAINED AN IN PERSONAM
JUDGMENT, OR EVEN SOUGHT ANYTHING
BUT AN IN REM JUDGMENT.

An affidavit of Shirley Kamhi, the ex-wife of plaintiff, sworn to on July 23, 1974, since this action was begun and the complaint served by the United States Marshal on June 25, 1974, discloses her explicit knowledge of this action. In that affidavit Shirley Kamhi has stated, as follows:

"xxx plaintiff deponent (Shirley Kamhi, the affiant) did not seek to obtain a personam judgment when she obtained this one. She sought and did recover jurisdiction of defendant's property in the State of New York, from which he (sic) she sought jurisdiction and ultimately payment."

I digress to say this is true, but only to the extent of such property in New York as was seized before entry of the in rem judgment, as held in the Geary and Caplan cases, infra.

Moreover, in the same affidavit she recognizes the fact that plaintiff is no longer a resident of New York State, stating as follows:

"xxx he has vacated his alleged residence in Nevada and has taken a new home in Sacramento, Calif., and has commenced work as a physician for a health organization at Sacramento, Calif., and has had himself listed in the telephone directories of that stated city as a physician. That deponent has called said address and telephone number and has heard the defendant's voice on the telephone."

POINT III

NEW YORK STATE STATUTES REGULATING
SERVICE OF PROCESS DO NOT ELIMINATE
THE FUNDAMENTAL QUESTION OF JURISDIC-
TION AND DOMICIL.

Defendant cites certain sections of New York's Civil Practice Law and Rules and its Domestic Relations Law dealing with service outside the State of New York as determining jurisdiction and domicil on which they have no bearing.

CPLR 313 may provide for service without the State giving personal jurisdiction, but only over residents of New York State.

Furthermore, Section 230 of the Domestic Relations Law has no bearing on jurisdiction over a resident and domiciliary of any State other than a resident of New York.

The in rem judgment may appear on its face to

confer in personam jurisdiction by reason of New York State statutes, but only if the defendant is a resident and domiciliary of the State of New York.

The issue in this action is Constitutional as to whether there was residence and domicile in the State of New York where process was served in another state.

The ex-wife has herself sworn her husband had departed his New York residence; she recognizes defendant left New York and made a life for himself elsewhere.

POINT IV

THE RECEIVER CANNOT SEIZE NEW YORK
PROPERTY AFTER FINAL JUDGMENT IN
A NEW YORK IN REM ACTION.

Geary v. Geary, 272 N.Y. 290.

Caplan v. Caplan, 30 N.Y.2d 941.

Defendant's criticism of the authority in this action of the Geary and Caplan cases is that in each of these cases the defendant did not reside in the State of New York. That is precisely the reason they are authority in this case, because Kamhi did not reside in or was he domiciled in New York when served.

That nonresidence of plaintiff is the issue in this case. It is alleged in the complaint and deemed

admitted as alleged, upon a motion to dismiss. In addition, it is clearly conceded by the former spouse that she did not receive or seek anything but an in rem judgment.

Again it is contended by defendant that Spindel v. Spindel, 283 F.Supp. 797, is inapplicable because it was a Federal review of jurisdictional question. This is the very reason it applies here, because this is a Federal review of jurisdictional question.

As the United States Supreme Court states in Williams v. North Carolina, 325 U.S. 226, at p. 231:

"For domicile is the foundation of probate jurisdiction as it is that of divorce."

Again, the doctrine of the Matthews case, 247 N.Y. 32, is likewise summarily disposed of because Mathews was a nonresident. Kamhi's whole contention is that he is a nonresident.

I regret counsel does not see the relevance of the leading case of Williams v. North Carolina, supra, which enunciated the principle hereinbefore quoted, "For domicile is the foundation of probate jurisdiction as it is that of divorce." Consequently, if New York lacks the domicile, it lacks the in personam jurisdiction defendant seeks to rely upon.

POINT V

PLAINTIFF ASSUMES THE DOMICIL OF PLAINTIFF IN NEW YORK WHEN THAT IS THE ISSUE, AND ON A MOTION TO DISMISS THE PLAINTIFF'S ALLEGATION OF DOMICIL WITHOUT THE STATE OF NEW YORK MUST BE DEEMED A FACT.

Again and again in his Brief defendant asserts that plaintiff is a resident of New York. That the fact is otherwise is amply established, but on the motion to dismiss the allegation of his nonresidence is not arguable.

POINT VI

CHAPTER 859 OF THE LAWS OF NEW YORK FOR THE YEAR 1974, EFFECTIVE JUNE 7, 1974, IS NOT RETROACTIVE OR EVEN CONSTITUTIONAL, AND CANNOT AFFECT THIS CASE.

In the desperation to create tardily an in personam judgment which she did not seek prior to the final in rem judgment, plaintiff's ex-wife attempts to find it retroactively in a New York statute, not effective until June 7, 1974. We will remind the Court that the final in rem decree was entered on April 25, 1974. A copy thereof is annexed to defendant's moving papers.

The Legislature of the State of New York has passed a statute known as Chapter 859 of the Laws of New York for the year 1974, effective June 7, 1974.

The statute reads as follow:

**"Courts - Retention of Jurisdiction -
Matrimonial Act**

Section 1, Subdivision (b) of section three hundred two of the civil practice law and rules is hereby relettered to be subdivision (c) and a new subdivision (b) is hereby inserted herein, in lieu thereof, to read as follows:

(b) Personal jurisdiction over non-resident defendant. A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony or alimony accrued under the laws of this state or under an agreement executed in this state.

Section 2 This act shall take effect immediately."

This attempts to provide in personam judgment over a bona fide nondomiciliary because he once lived in a married state with plaintiff in New York.

However, it does not attempt to be retroactive. It only became effective June 7, 1974, after the final judgment in this case on April 25, 1974.

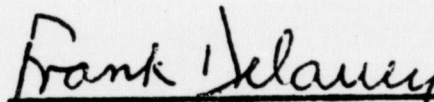
This is a further obvious concession by plaintiff in the affidavit in the in rem action she swore to on July 23, 1974, that she wishes a further judgment in personam by serving Frank Delaney on account of his bringing this case of Kamhi v. Cohen, so she can take action in the "state of defendant's residence," obviously conceded to be elsewhere than New York State.

If, as the Williams case holds, jurisdiction depends on domicil, then for New York to attempt to fix jurisdiction independent of domicil is obviously unconstitutional.

CONCLUSION

Defendant's entire memorandum begs the question. The question is, was the plaintiff a nonresident and nondomiciliary of the State of New York when he was served in the State of Nevada. If he is found such a non-domiciliary, then there was no in personam jurisdiction, and seizure after final judgment in the in rem case is not permissible.

Dated: New York, New York
August 29, 1974.


FRANK DELANEY
Attorney for Plaintiff
750 Park Avenue
New York, New York 10021
212/TR 9-4600

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

BERNARD KAMHI,

74 CIV 937

Plaintiff,

-against-

MANHIE COHEN

AS RECEIVER,

Defendant.

----- X

MEMORANDUM IN OPPOSITION
TO COUNTER-ORDER

The plaintiff objects to the last two ordering paragraphs on page 2 of the proposed Counter-Order on these grounds.

As to the first Ordering Paragraph, there is no proof that Shirley Kamhi can be served, and the undersigned was seriously assaulted with a large block of wood and threatened with more serious bodily harm by her brother named Licht in serving Shirley Kamhi on a previous occasion.

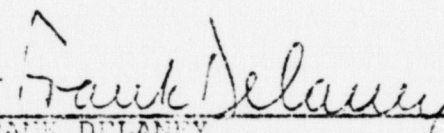
As to the last Ordering Paragraph, this notion of defendant to dismiss for lack of an indispensable party is not upon the merits and should not be dismissed with prejudice, and as Shirley Kamhi was not represented,

there should not be costs.

It is one thing to dismiss a suit for lack of a dispensable party, but this cannot justify a dismissal with prejudice for defect of parties, ordering in effect plaintiff to sue Shirley Kamhi upon the pain of the suit being res judicata against plaintiff.

Plaintiff still has the right to sue in the New York Courts if Shirley Kamhi is an indispensable party in the U. S. Courts.

Dated: New York, New York
September 28, 1974


FRANK DELANEY
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BERNARD KAMHI,

Plaintiff,

-against-

MANNIE COHEN

AS RECEIVER,

Defendant.

74 CIV 937

COUNTER-ORDER

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

SEP 30 1974

A motion having been made by the defendant 1) to dismiss the complaint herein for failure to state a claim against the defendant upon which relief can be granted, and 2) for failure to include an indispensable party and the motion having come on to be heard before Judge Neaher in the above Court in the United States Courthouse in Brooklyn, Kings County, New York, on August 30, 1974, and the defendant appearing by Messrs. Kadanoff and Haussman, P.C., Arthur J. Haussman, Esq. of Counsel, and he having been heard in support of the said motion and the plaintiff, appearing by Frank Delaney, Esq., and he having been heard in opposition to said motion, and due deliberation having been had, and the Court having made its decision upon the argument.

NOW, THEREFORE, upon the summons and complaint herein, and the notice of motion of defendant herein, and the affidavit of defendant MANNIE COHEN, sworn to July 9, 1974, and the

affidavit of ARTHUR J. HAUSSMAN, sworn to August 16, 1974, in support thereof, and the affidavits of FRANK DELANEY, sworn to July 29, 1974, in opposition, it is

ORDERED, that the motion of defendant to dismiss the complaint for failure to state a claim against the defendant upon which relief can be granted, be and the same hereby is denied, and it is further

ORDERED, that the motion of the defendant to dismiss the action upon the ground that plaintiff has failed to include SHIRLEY KAMHI as an indispensable party be and the same hereby is granted, unless plaintiff serves and files an amended summons and an amended complaint upon the defendant and upon SHIRLEY KAMHI, or before the 31st day of October, 1974, and it is further

ORDERED, that unless the said supplemental summons and amended complaint is served and filed as set forth hereinabove, the complaint is hereby dismissed.

(Sgd.) Edward R. Neaher
Judge of the United States
District Court for the
Eastern District of New York

September 30, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BERNARD KAMHI,

Plaintiff,

-against-

MANNIE COHEN, Receiver

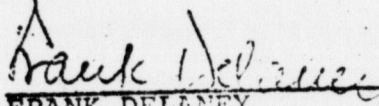
Defendant.

Notice of Appeal
to the United States
Court of Appeals,
Second Circuit

74 C 937

-----X

Notice is hereby given that Bernard Kamhi, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from so much of the order herein entered on September 30, 1974, as dismisses the complaint herein on the ground numbered 2 in the Notice of Motion, otherwise denied, because of failure to include Shirley Kamhi as an indispensable party defendant, unless the complaint is amended and said indisputable party is served with process on or before October 30, 1974.


FRANK DELANEY
Attorney for Appellant,
Bernard Kamhi
750 Park Avenue
New York, New York 10021

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BOND NO. 2446277

FIREMANS FUND
AMERICAN INSURANCE COMPANIES

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK IN THE SECOND CIRCUIT

BERNARD KAMHI

Plaintiff

UNDERTAKING FOR COSTS ON APPEAL

against

INDEX NO. 74C/937

MANNIE COHEN, Receiver

Defendant

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, having an office and place of business in the City, County and State of New York, is held and firmly bound unto the above named Mannie Cohen in the sum of TWO HUNDRED FIFTY AND NO/100 (\$250.00) Dollars, for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

WHEREAS, on the 30th day of September, 1974, an Order was entered in the above entitled proceeding;

AND the appellant Bernard Kamhi feeling aggrieved thereby, appeals to the UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the aforesaid Order is affirmed or modified by the appellate court or if the appeal is dismissed, the appellant Bernard Kamhi will pay all costs which may be awarded against him on said appeal.

DATED, New York, this 22nd day of October, 1974.

NATIONAL SURETY CORPORATION

ONLY COPY AVAILABLE

By

Robert Di Scala, Attorney-in-Fact

STATE OF NEW YORK
COUNTY OF **New York**

SS.

On the 22nd day of October in the year 1974 before me personally came Robert Di Scala to me known, who, being by me duly sworn, did depose and say that he resides at 3818 14th Avenue, Brooklyn, N.Y.; that he is an Attorney-in-Fact of NATIONAL SURETY CORPORATION, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by the board of directors of said corporation and that he signed his name thereto by like order; and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 882 of the Laws of the State of New York for the year 1939 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended issued to the National Surety Corporation his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guarantees and other obligations required or permitted by law; and that such certificate has not been revoked

Notary Public

POWER OF ATTORNEY

STATE OF NEW YORK
COUNTY OF **New York**

SS.

I, Walter Pratz, Resident, Assistant Secretary of NATIONAL SURETY CORPORATION, do hereby certify that the following is a full, true and correct copy of Article VII and VIII of the By-Laws of the NATIONAL SURETY CORPORATION adopted on the 2nd day of October, 1970, and now in full force and effect, to wit:

Article VII, Execution of Instruments Pertaining to the Insurance Business of the Company.

Section 28. All policies, bonds, undertakings, certificates of insurance, cover notes, recognizances, contracts of indemnity, endorsements, stipulations, waivers, consents of sureties, re-insurance acceptances or agreements, surety and co-surety obligations and agreements, underwriting undertakings, and all other instruments pertaining to the insurance business of the Company, shall be validly executed when signed on behalf of the Company by the Chairman of the Board of Directors, the President, any Vice President, any other officer, employee, agent or attorney-in-fact authorized to so sign by (i) the Board of Directors, (ii) the Chairman of the Board of Directors, (iii) the President, (iv) any Vice President, or (v) any other person empowered by the Board of Directors, the Chairman of the Board of Directors, the President, or any Vice President to give such an authorization; provided that all policies of insurance shall also bear the signature of the Secretary, which may be a facsimile, and unless manually signed by the Chairman of the Board of Directors, the President, or a Vice President, a facsimile signature of the Chairman of the Board of Directors or the President. A facsimile signature of a former officer shall be of the same validity as that of an existing officer.

The affixing of the Corporate seal shall not be necessary to the valid execution of any instrument but any person authorized to execute such instrument may affix the Company's seal thereto.

Article VIII, Appointment and Authority of Resident Assistant Secretaries, and Attorneys-in-Fact, and Agents to Accept Legal Process and Make Appearances.

Section 29. *Appointment.* The Chairman of the Board of Directors, the President, any Vice President, or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice President, may, from time to time, appoint Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company and Agents to accept legal process and make appearances for and on behalf of the Company.

Section 30. *Authority.* The authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment, and any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment.

I do further certify that pursuant to said By-laws, Thomas T. Carmick, Lawrence Carr, Harold J. Carr, Walter M. Carr, Barbara DeGray, Stella Dill, Robert Di Scala, George H. Faha, William W. Finkle, Anthony Garbarini, Denise Gennari, Kenneth R. Heitman, C. A. Humenik, Robert M. Kumpfbeck, Charles W. LeVine, James D. McAdoo, Karen McMullin, Zeldia Multz, Robert K. O'Brien, Charles F. Perkins, Joan M. Pfanner, Walter Pratz, Roberta Rosenfeld, Lawrence H. Savoy, Noel Slinker, Christine A. Szal, Robert J. Vairo, Joseph A. Valone, Wayne W. Watson, Robert J. Wheaton and Floyd H. White, were each duly appointed Attorney-in-Fact of NATIONAL SURETY CORPORATION on the 1st day of January, 1973, with full power and authority to execute, acknowledge and deliver any and all bonds, recognizances, contracts, agreements of indemnity and other conditional or obligatory undertakings, without limitation as to the amount. Said power of attorney is in full force and effect and has not been revoked.

I do further certify that the Superintendent of Insurance of the State of New York has issued to the NATIONAL SURETY CORPORATION his certificate that said Company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings and other obligations or guarantees, as provided in the Insurance Law of the State of New York and all laws amendatory thereof and supplementary thereto; and that such certificate has not been revoked.

Subscribed and sworn to before me this

22nd day of October, 1974

Notary Public

Assistant Secretary

Notary Public
Walter Pratz, Resident
Assistant Secretary
Commission Expires 12/31/75

REV.—1-73

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CLERK'S ^{97A} CERTIFICATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
BERNARD KAMHI

-against-

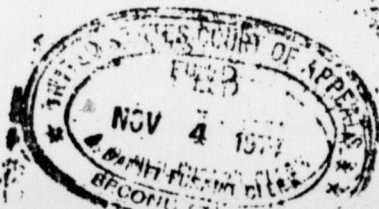
MANNIE COHEN, Receiver

:
:
74 C 937
-----x

I, LEWIS ORGEL, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing copy of the Docket Entries from A to B and the original papers numbered from page 1 to 14 constitute the Record of Appeal.

I further testify that the last day to file said record is December 2, 1974.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed, at the Borough of Brooklyn in the Eastern District of New York, this 4th day of November in the year of our LORD, One Thousand Nine Hundred and Seventy-Four and of the Independence of the United States One Hundred and Ninety-Nine.



Lewis Orgel
CLERK

By: *Richard Lind*
DEPUTY CLERK
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STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of May, 1974 deponent served the within *Appendix* upon *Arthur Hausman*

attorney(s) for *Rpsellke*

in this action, at *50 Court St*
Brooklyn, NY - 11201

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

26 day of *May*, 1974

William Bailey
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976



